Supreme Court No. 82192-5

IN THE WASHINGTON SUPREME COURT

THE CITY OF SEATTLE, a municipal corporation,

Respondent/Plaintiff,

v.

ALBERT HEGLUND, JR., AND HELENE HEGLUND, husband and wife; WEST MARINE FINANCE COMPANY, INC.; WEST MARINE PRODUCTS, INC.; A HEGLUND JR. DBA A H PROPERTIES; and KING COUNTY, a subdivision of the state of Washington.
Defendants/Appellants,

# BRIEF OF APPELLANT WEST MARINE PRODUCTS, INC.

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## I. INTRODUCTION

This case asks this Court to address whether the City of Seattle ("City") may condemn property when it refuses to disclose specifics of private participation in a public project for which the power of eminent domain is being exercised. Here, the City has acknowledged the need for private participation with regard to the Mercer Street road widening project but steadfastly refuses to disclose the specifics of such participation contending that it is irrelevant as this matter involves a roadway project. In short, the City's position is that all roadway projects receive a rubber stamp from the courts when making a finding of public use and necessity.

However, simply because a roadway project is at issue, it does not necessarily follow that the project passes the public use and necessity hurdle as a matter of law. *King County v. Theilman*, 59 Wn.2d 586, 595, 369 P.2d 503 (1962); *State v. Superior Court*, 128 Wash. 79, 222 P. 208 (1924); *Cowlitz County v. Martin*, 142 Wn. App. 860, 177 P.3d 102, *review denied*, 164 Wn. 2d 1021 (2008). Even in *State v. Bank of California*, 5 Wn. App. 861, 491 P.2d 697 (1971) where the State of Washington sought to condemn a greenbelt along a

roadway project, the project did not pass an analysis of public use and necessity.

The singular authority cited by the City is *Steilacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966). There, the project at issue was a subterranean sewer line which (unlike here) did not interfere with the condemned possessor's use of their property such as here.

West Marine disagrees with the City. Beginning with *In re City of Seattle*, 96 Wn.2d 616, 625, 638 P.2d 549 (1981) ("*Westlake I*"), this Court imposed a balancing test on public-private partnerships in public projects and thus began a change in the analysis applicable to the question of public use and necessity. This Court further refined the required balancing test in *In re: City of Seattle,* 104 Wn.2d 621, 623, 707 P.2d 1348 (1985) (*"Westlake II")* and *State ex.rel Convention Center v. Evans*, 136 Wn.2d 811, 818, 966 P.2d 1252 (1998) ("*Convention Center*"). Despite this clear mandate, the City contends that private money participation in the roadway project here is irrelevant. RP 34, 42-43.

The purpose of the balancing test is to ensure that private participation in a public project does not outweigh the

public component. The private component must be incidental to the public component otherwise the exercise of eminent domain for such a project is unconstitutional. *Convention Center v. Evans*, 136 Wn.2d at 817. Until the private participation in this project is finally determined and disclosed, the constitutionally mandated balancing test cannot be employed as there is no way to determine whether the private component is incidental to the public component.

Further, at the heart of this case is City's notion that it does not need to disclose what plans it is making with private developers as part of the Mercer Street project. Not only does this run afoul of Constitutional requirements in an eminent domain case, it is offensive to our sense of open government.

> A democracy cannot function unless the people are permitted to know *what their government is up to.*

(Emphasis in the original.) *U.S. Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 773, 109 S. Ct. 1468, 1481 (U.S.Dist.Col.,1989) *citing EPA v. Mink*, 410 U.S. 73, 105, 93 S. Ct. 827, 832, 35 L.Ed.2d 119 (1973) (Douglas, J., dissenting). Such a state of affairs is either actual or

constructive fraud. The trial court should be reversed and the matter dismissed.

## II. ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The trial court erred by granting the City's motion on public use and necessity.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1: Whether the City met its burden of proof on a motion to determine public use and necessity where there is an admitted private participation in a public project but the particulars of such private participation have not been disclosedor finalized by the City?

Issue No. 2: Whether the constitutionally mandated balancing test which requires a court to balance the private participation in a public project with the public participation can be employed where the condemning authority refuses to disclose the particulars of the private participation and contends that the information is irrelevant?

Issue No. 3: Whether the City is engaging in an actual or constructive fraud by refusing to disclose the particulars of the private participation in this public project and acknowledging undisclosed additional purposes for it?

Issue No. 4: Whether the court erred by ignoring West Marine's argument that the City's ordinance authorizing condemnation violates RCW 8.12.040?

## IV. STATEMENT OF THE CASE

### A. SUBSTANTIVE FACTS

The property involved in this matter is commonly known as 1000 Mercer Street ("Property") and is owned by Albert and Helene Heglund ("Heglund"). West Marine Products, Inc. ("West Marine") is the tenant on the property with a leasehold interest until 2019. See Declaration of Jim Abel, Ex. A.[1] West Marine has been in its present location since 1989. *Id.* Ex. A. A copy of a map of the Property is located at CP 34. Appendix. A.

The Property is located in the South Lake Union Neighborhood of the City of Seattle ("SLU"). CP 378. The City's Comprehensive Plan ("Comprehensive Plan") sets out the following transportation policy for SLU:

> Encourage improvements to Mercer and Valley Streets that support development of South Lake Union Park, improve neighborhood circulation for all modes, and move people and freight efficiently through this corridor.

[1] The Clerk's Papers do not contain the full declaration of Jim Abel, but the GR 17 affidavit confirming his facsimile signature. A supplemental designation of clerk's papers is filed along with this brief asking the trial court to transmit this document to this court.

CP 379. In 1998, the City adopted the South Lake Union Neighborhood Plan ("Neighborhood Plan"). CP 387-417. The Neighborhood Plan recommends improvements to the Mercer Corridor that do not include a two-way Mercer Street. CP 412.

Mercer Street is a one-way eastbound street. Valley Street, one block immediately to the north of Mercer Street, is a two way street. Mercer and Valley work in tandem with one another to provide access to and from Interstate 5. CP 225.

In July 2004, the City received a transportation study of SLU ("Transportation Study"). CP 201-372. The conclusion of the Transportation Study was to implement a Two-Way Mercer/Narrow Valley plan that extended a two-way Mercer to Fifth Avenue South. CP 307-08. The main objective of the Transportation Study was to "form a set of transportation strategies to address existing problems and to support and shape the development of the South Lake Union Village." CP 207.

In November 2006, the City received a Mercer Corridor Improvements Project Transportation Discipline Report ("Traffic Study"), which reviewed a similar Two-Way Mercer/Narrow Valley plan as recommended by the 2004 Transportation Plan.

CP 74-197.[2] The results of the Traffic Study show that there will be no improvement of congestion along Mercer with the implementation of the Two-Way Mercer/Narrow Valley plan. CP 163.

> "Some PM times peak-hour travel times...would increase slightly as a result of the project."
>
> "In the AM peak hour, the eastbound travel times would be slightly worse than in the No Action condition...."

CP 163.

On September 24, 2007, the Seattle City Council passed an ordinance ("2007 Ordinance") authorizing the use of eminent domain to acquire the Property (and other parcels) for the Mercer Project. CP 69-73. The 2007 Ordinance stated that funding would come from "funds appropriated, or to be appropriated, for such purposes in connection with the project." CP 70-71. Thus, the original ordinance failed to identify or provide for funding even though it authorized the exercise of eminent domain.

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[2] Reliance on the 2004 study for traffic impacts of Mercer widening is suspect because the current project does not widen Mercer past Highway 99. The 2006 Traffic Study only considered a two-way Mercer Street to Dexter Avenue, not to Fifth Avenue South as was recommended in the 2004 Transportation Study. CP 100, CP 307.

On May 12, 2008, the City Council passed an ordinance relating to certain capital activities of the City's Department of Transportation ("2008 Ordinance"). CP 54-67. The 2008 Ordinance increased appropriations for the Mercer Project, which allowed the City to begin acquisition of the Property and continue with project design work. The 2008 Ordinance also recited:

> WHEREAS, the revised finance plan for the Mercer Project leaves a funding gap of $88 million in currently unsecured funding anticipated from private participation and state and federal sources; ...

CP 56. The Ordinance also recited:

> WHEREAS, the City Council intends to consider future appropriation authority for the Mercer Project in the context of whether substantial progress is made toward closing this funding gap; ...

CP 56. The Council then imposed a list of requirements for the Mayor's office to satisfy before additional appropriations would be made for the Mercer Project. CP 57-58. The following requirements are relevant to this motion:

> Section 4. **Future appropriation authority related to the Mercer Project will not be granted until** the City Council has had the opportunity to evaluate the Executive's progress toward closing the existing funding gap. To inform

this evaluation, the Executive will provide the following information to the City Council:

1. A fully revised financing plan for both the Spokane St. Viaduct Project and Mercer Project that includes: ...

(c) Documentation of anticipated revenues and supporting information from **specific sources of funding that the Executive has characterized as "private participation"** in their April 2008 financing plan for the Mercer Project. These sources should total the equivalent of $36.2 million in funding for the project or reductions or off-sets in private participation funding realized through real estate acquisition for right of way needs; ...

(f) A contingency plan that identifies proposed alternative funding sources in the event that either project fails to secure all anticipated revenues.

(Emphasis added.) CP 57-58.

## B. PROCEDURAL FACTS

Despite this obvious funding gap and the unknown or undisclosed private participation in the Mercer Project, the City initiated this action on August 15, 2008. CP 1-6. On September 22, 2008, a hearing on the City's motion to determine public use and necessity was held. CP 474-77. The trial court concluded that the City had met its burden and granted its motion. This appeal followed. CP 472-73.

## V. ARGUMENT

### A. CONSTITUTIONAL PROVISIONS, THE BURDEN OF PROOF & ADDITIONAL STANDARDS

Section 1 of Article 16 of the Washington Constitution governs the powers of eminent domain in the State and provides in relevant part:

> No private property shall be taken or damaged for public or private use without just compensation having been first made.... Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public.

CONST. Art. 1, §16. These provisions are mandatory and place an affirmative burden on the City to prove all of the elements on a motion for public use and necessity.

> Article I, section 16's use of the word "shall" is imperative and operates to create a duty on the courts. *See, e.g., Crown Cascade, Inc. v. O'Neal,* 100 Wn.2d 256, 668 P.2d 585 (1983). *See also* WASH. CONST. art. I, § 29 ("The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise.").

*Public Utility Dist. No. 2 of Grant County v. North American Foreign Trade Zone Industries, LLC*, 159 Wn.2d 555, 603, 151 P.3d 176 (2007) (J.M. Johnson, J. dissenting).

> Because constitutional rights of a property owner are implicated, the burden of proof is *on the*

> *condemning agency* to demonstrate that the condemnation is for a public use and that the taking is necessary for that public use. *State ex rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 822-23, 966 P.2d 1252 (1998) ( *Convention Ctr.); King County v. Theilman*, 59 Wn.2d 586, 369 P.2d 503 (1962).

*Public Utility Dist. No. 2*, 159 Wn.2d at 598 (J.M. Johnson, J. dissenting); *Yakima County v. Evans*, 135 Wn. App. 212, 218, 143 P.3d 891, 894 (2006) ("The burden of proof is on the condemnor, here the County."); CR 7 (a motion "shall state with particularity the grounds therefor").

When a property is subject to an action in eminent domain, this Court applies a three-part test in evaluating whether the action is proper and again places the burden of proof on the City as the condemning authority in setting out that test:

> For a proposed condemnation to be lawful, **the State must prove** that (1) the use is public; (2) the public interest requires it; and (3) the property appropriated is necessary for that purpose.

(Emphasis added.) *State ex rel Convention Center v. Evans*, 136 Wn.2d 811, 818, 966 P.2d 1252 (1998) ("*Convention Center*"); *In re: City of Seattle*, 104 Wn.2d 621, 623, 707 P.2d 1348 (1985) (*"Westlake II"*); *In re City of Seattle*, 96 Wn.2d 616, 625, 638 P.2d 549 (1981)

("*Westlake I*"). When applying this test, it is important to remember that:

> The words "public use" are neither abstractly nor historically capable of complete definition. 'Public use' and 'necessary' cannot be separated with scalpellic precision, for the first is sufficiently broad to include an element of the latter.

*King County v. Theilman*, 59 Wn. 2d 586, 595, 369 P.2d 503 (1962). Thus, there is an element of all three requirements in each other. Further,

> Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the held of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.

*Malyon v. Pierce County*, 131 Wn.2d 779, 799 n. 31, 935 P.2d 1272 (1997), *citing* Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §451 (Melville M. Bigelow ed., 5th ed. 1891).

## B. WASHINGTON LAW REQUIRES BALANCING BETWEEN PRIVATE AND PUBLIC PARTICIPATION IN A PUBLIC PROJECT.

Private participation in a public project is permitted in Washington. *Lynnwood*, 118 Wn. App. at 684-688. However, in such a circumstance, the court balances the private participation with the public participation to ensure that the private participation does not overwhelm the public.

> "[I]f a private use is combined with a public one in such way that the two could not be separated, that the right of eminent domain may not be invoked to aid the joint enterprise. We mean by this, that the two purposes must together exist as main, or principal, ones; but where the private purpose is simply an incident, and the public use the principal, then the incident will not destroy or defeat the principal."
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> *Nisqually Power Co.*, 57 Wash. at 428, 107 P. 199 (quoting *Lake Koen Navigation, Reservoir & Irrigation Co. v. Klein,* 63 Kan. 484, 497, 65 P. 684 (1901)).

*Convention Center*, 136 Wn.2d at 822. In the *Convention Center* case, this Court analyzed whether or not surplus space in the Washington Convention Center project in Seattle could be leased to private parties and still pass a public use and necessity analysis. The Court concluded it could by applying a balancing test between the anticipated private participation and the public participation. *Id.* at 821-822.

### 1. The Specifics of the Private Participation are Relevant

The City argues that since this project is a roadway project, it necessarily passes the test of public use and necessity relying heavily on *Steilacoom v. Thompson*, 69 Wn.2d 705, 419 P.2d 989 (1966). Based on *Steilacoom,* the City argues that since there will allegedly be no private use of the property subject to eminent domain (a roadway project), the extent of the private participation is irrelevant. *Steilacoom* does not contain such a statement.[3] In *Steilacoom*, the project at issue was a subterranean sewer line which did not interfere with the condemned property owner's or possessor's use of their property such as here. *Id.* at 706. In such circumstances, the court concluded that an adjoining property owner's payment of all costs of installing the sewer line was proper.

Here, all improvements to the property will be destroyed and West Marine is being required to relocate. Thus, factually, *Steilacoom* is not on point. Rather, the closer case is *King County v. Theilman*, 59 Wn.2d 586, 369 P.2d 503 (1962). There, this Court was asked to decide whether King County's

[3] West Marine can find no case in Washington which states that the information relating to private participation in a public project is irrelevant.

use of the power of eminent domain for a road was proper. King County sought to condemn the Theilman's property for a public road which was intended to provide access to property owned by the Highland Development Company. In concluding that the project failed under a necessity analysis, the Court stated:

> From the record, it is apparent that the Highland Development Company could not have condemned relator's property as a private way of necessity; the company had highway frontage and two feasible ways of approach. Though we do not think the county's participation in taking relator's property by eminent domain is a cloak to cover private objectives, the effect of this action is to allow a private party to do indirectly that which the law forbids him to do directly. The ultimate effect is to allow a neighboring land developer to take private property for a private use. This action is the county's in name only. **It had no funds budgeted either to acquire relator's land or to build the road across it.**

(Emphasis added.) *Id.* at 595-596. This Court concluded that the project was improper and reversed the finding of public use and necessity.

In contrast to the present case, in *Theilman*, *Steilacoom*, *Westlake I*, *Westlake II*, *Convention Center*, and *Lynnwood*, the specifics of the private participation in the public project were known. In the present case, there is no such information.

Without it, the constitutionally mandated balancing test cannot be employed.

### 2. Without Disclosure of the Private Participation, the Propriety of the Project Cannot Be Analyzed

It is undisputed that the Mercer Project cannot go forward without private participation as acknowledged by the 2008 Ordinance. At present (or at least in the Spring of 2008), the Mercer Project is 88 million dollars short of funds to construct it and at least 36 million of that 88 million dollar shortfall is to come from unnamed private sources. Without a specific statement of just exactly how much money is coming from the unnamed private sources, and what those unnamed private sources will receive for their contributions, the constitutionally mandated balancing test cannot employed. Until the balancing test can be applied to this matter, *i.e.* until the private participation in the Mercer Project is finally determined and analyzed,[4] the question of public use is not "ripe." *E.g. City*

[4] In inverse condemnation matters, a final determination is required. The same should be true for direct condemnation matters. For example, *Orion Corp. v. State*, 109 Wn.2d 621, 673-674, 747 P.2d 1062 (1987) states: "The United States Supreme Court has consistently held that a regulatory takings claim is not ripe until the governmental entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *MacDonald, Sommer & Frates v. Yolo Cy.*, 477 U.S. 340, ---- - ----, 106 S.Ct. 2561, 2565-66, 91 L.Ed.2d 285, 294-95 (1986), *Williamson Cy. Regional Planning Comm'n v. Hamilton Bank*, 473

*Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1089 (6th Cir. 1989) ("Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all.").

As the City admitted at the trial court, the private participation was still being "negotiated" (RP 15) and thus the amount of and the specifics of the private funding are anchored in future events. Until that private participation is finalized and disclosed, the constitutionally mandated balancing test cannot be used.

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U.S. 172, 186, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1985). Generally, to state a regulatory takings claim a property owner must first establish that the regulation has in substance "taken" property that is, that the regulation "goes too far". *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L.Ed. 322 (1922); *Hamilton Bank*, 473 U.S. at 186, 105 S. Ct. at 3116. Determining whether a regulation has gone "too far" depends, in significant part, upon an analysis of the economic impact of the challenged regulation and the extent to which it interferes with reasonable investment-backed profit expectations. *Hamilton Bank*, at 190-91, 105 S.Ct. at 3119. It is impossible to accurately evaluate these factors "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Hamilton Bank*, at 191, 105 S.Ct. at 3119."

## C. AS THE PRIVATE PARTICIPATION HAS NOT BEEN FINALLY DETERMINED, THE QUESTION OF PUBLIC USE CANNOT BE ANSWERED

The determination of what is a public use as against a private use is a judicial question, *i.e.*, a question of law. CONST. Art. 1, §16; *Des Moines v. Hemenway,* 73 Wn.2d 130, 138-39, 437 P.2d 171 (1968).

> ... the *public use* implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it.
>
> ... [W]e are of the opinion that the use under consideration must be either a use by the public, or by some agency which is quasi-public, and **not simply a use which may incidentally or indirectly promote the public interest** or general prosperity of the state.

(Emphasis added.) *Healy Lumber Co. v. Morris*, 33 Wash. 490, 508-09, 74 P. 681 (1903); *accord Westlake I,* 96 Wn.2d at 627 ("A beneficial use is not necessarily a public use.").

As a judicial determination, the courts consider all property involved in the project as a whole, not just that at issue in an action. *In re: City of Lynnwood,* 118 Wn. App. 674, 681, 77 P.32d 378 (2003).

> A trial court should not put on blinders, as it were, to the project as a whole in adjudicating public use and necessity for the condemnation of various component parts of the project. It is not at all unusual for public bodies to acquire some of the properties needed for a particular project by condemnation and others by purchase. It is only by considering the project as a whole that a court can properly adjudicate whether a component parcel is being condemned for a truly public use.

*Lynnwood,* 118 Wn. App. at 682. The proper focus here is the Neighborhood Plan of which the Mercer Project is a part. Considering the Neighborhood Plan, the fact that the proposed two-way Mercer Street is not consistent with it, that the proposed fix actually worsens traffic and the lack of information regarding the private participation in the Mercer Project, it is clear that the Mercer Project cannot pass a public use and necessity analysis.

**1. Roadway Projects are Not Rubber Stamped**

While the use of eminent domain for roadway purposes is generally a public use, that is not always the case. *King County v. Theilman*, 59 Wn.2d 586, 595, 369 P.2d (1962) (use of eminent domain for roadway to access to subdivision deemed improper); *State v. Superior Court*, 128 Wash. 79, 222 P. 208 (1924) (roadway project failed necessity analysis); *Cowlitz County v. Martin,* 142 Wn. App. 860, 177 P.3d 102, *review*

*denied*, 164 Wn. 2d 1021 (2008) (including road repair as a purpose for action to condemn for installation of culvert to protect salmon stream not proper). Rather, when any private participation is involved in any public project, that private participation must be weighed against the public participation. *E.g. Convention Center*, 136 Wn.2d at 821-22; *Westlake II* at 624 ("If a private use is combined with a public use – or an improper use -- in such a way that the two cannot be separated, the right of eminent domain cannot be invoked."); *Theilman* at 596 ("This action is the county's in name only. It had no funds budgeted either to acquire ... land or to build the road across it."). Thus, contrary to the City's position, the mere fact that a roadway project is at issue does not render it a foregone conclusion that it will pass a public use and necessity analysis.

**2. The City is Obligated to Disclose the Particulars of the Private Participation**

The City contends it had no obligation to disclose the details of the private participation in the Mercer Project as it claims that this matter involves a transportation project. RP 41-42. The City further contends that the amount of private participation is irrelevant to these proceedings because there is

no "private use" of the anticipated roadway. RP 43. In fact, the City specifically stated to the trial court at the hearing on public use and necessity that the private participation was still being "negotiated." RP 15. Not only is the failure to disclose this information a failure by the City to meet its burden of proof, the City is required to operate in the open, not behind closed doors.

**a. The City has Failed to Meet its Burden of Proof**

Again, it is the City's obligation to prove that the Mercer Project meets all the elements of a public use and necessity analysis. *Convention Center,* 136 Wn.2d at 818. As it has not presented any specifics of the acknowledged private participation, it has not, and cannot meet its burden of proof until the information is presented and analyzed by a court. It thus is obliged to produce this information.

**b. The City's Failure to Disclose the Private Participation Violates Public Policy of an Open Government**

The City's position also raises the specter of a closed government, which is contrary to the laws of Washington that secure an open government. The City's position runs afoul of

this important public policy as set forth in the Public Records Act:

> The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created.

RCW 42.56.030. *See also* RCW 42.56.904 ("The legislature intends to clarify that the public's interest in open, accountable government includes an accounting of any expenditure of public resources"); *Tacoma Public Library v. Woessner*, 90 Wn. App. 205, 223, 951 P.2d 357 (1998) ("purpose of the PDA is to keep the public informed so it can control and monitor the government's functioning"). "The PDA reflects the belief that the public should have full access to information concerning the working of the government." *Amren v. City of Kalama*, 131 Wn.2d 25, 31, 929 P.2d 389 (1997). The purpose of the PDA is to ensure the sovereignty of the people and the accountability of the governmental agencies that serve them. RCW 42.17.251.[5] Even the Federal Courts agree on the citizenry's right to know what the government is "up to".

[5] In 2005, RCW 42.17.251 was recodified as RCW 42.56.030.

> a democracy cannot function unless the people are permitted to know *what their government is up to.*

(Emphasis in the original.) *U.S. Dept. of Justice v. Reporters Committee For Freedom of Press*, 489 U.S. 749, 773, 109 S.Ct. 1468, 1481 (U.S.Dist.Col.,1989) *citing EPA v. Mink*, 410 U.S. 73, 105, 93 S. Ct. 827, 832, 35 L.Ed.2d 119 (1973) (Douglas, J., dissenting).

The City's position, and the trial court's endorsement of it, is troubling. It is the City's contention that even though it does not have full public funding of the Mercer Project and must therefore look to private resources, the source of the funding and its specifics are irrelevant and need not be disclosed prior to a judicial determination of public use and necessity. RP 13-16. It also contends that such issues are not properly brought within the context of a public use and necessity challenge but is subject to scrutiny at some other time. In fact, the City argued that after the Property was condemned, a condemnee could go back to the legislature to complain. RP 41.

Frankly, when private money is a part of a public project for which the power of eminent domain is used, those in possession of the property and the property owner have a right,

as a matter of common sense, if not a constitutional basis, to know who is contributing the money to the project and what that person or entity is getting for the contribution. To withhold this information prior to a determination of public use and necessity is to cause irreparable harm to the possessor and owner, as in the circumstances in this case, and raise the possibility that West Marine (and the Heglunds) will be divested of their property without a proper judicial inquiry into the City's arrangement with private contributors. Such divestment could even occur where the terms of the private contribution was later determined to be unlawful. In such a circumstance, the harm to a tenant or property owner is irreparable. Challenging the propriety of such a private arrangement in the circumstances presented here is a proper and necessary exercise of a property owner's Constitutional rights. Without this information, the constitutionally mandated balancing test cannot be applied. Further, without knowing who or what the private participation is, the privileges and immunities clause[6] of the Washington

[6] Article One, Section 12 of the Washington Constitution provides: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges and immunities which upon the same terms shall not equally belong to all citizens or corporations."

Constitution (Const. art 1, §12) is also in play as Justice Sanders recently noted:

> The framers drafted the constitution with the purpose of protecting "personal, political, and economic rights from both the government and corporations, and they strove to place strict limitations on the powers of both." Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights,* 7 U. PUGET SOUND L.REV. 491, 519 (1984). *See also Grant County Fire Prot. Dist. v. City of Moses Lake,* 150 Wn.2d 791, 808, 83 P.3d 419 (2004) ( "Washington's addition of the reference to corporations demonstrates that our framers were concerned with undue political influence exercised by those with large concentrations of wealth...."); Lebbeus J. Knapp, *Origin of the Constitution of the State of Washington,* WASH. HIST. Q. 227, 228 (1913) (stating Washington's constitution "fully and explicitly" restricts the legislative "power to grant any person or class of persons any exclusive political honors or privileges").

*Ventenbergs v. City of Seattle,* 163 Wn.2d 92, 117-118, 178 P.3d 960 (2008) (Sanders, J., dissenting). It is inappropriate to simply assume that the undisclosed private participation in the Mercer project is constitutional or proper. Rather, the presumption should be that it is improper and is providing a benefit to certain citizens (unnamed property owners) that

others do not have.[7] There is no other reasonable explanation for the City's failure to produce the information.

### C. THE PUBLIC INTEREST DOES NOT REQUIRE A PROJECT WHICH DOES NOT SOLVE A PROBLEM

The City's "determination" that the Mercer Project is a public use is not dispositive of the issue. As this Court has stated:

> A determination that an acquisition is for a "public use" is not precisely the same thing as determining it is a "public necessity," even though the two terms do overlap to some extent. The "question [as to] whether the contemplated use be really public shall be a judicial question." Although the legislature may declare that a particular use of property is a "public use," that determination is not dispositive.

(Citations omitted.) *HTK Management, LLC v. Seattle Popular Monorail Authority*, 155 Wn.2d 612, 629, 121 P.3d 1166 (2005).

The term "public use" is not specifically defined by the eminent domain statutes contained in RCW Title 8. Referring to a dictionary[8], the term "public" is defined as "of or relating to the people in general" and the term "interest" is defined as "participation in advantage and responsibility." MERRIAM-

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[7] The City has not established an LID for funding of the Mercer Project.

[8] When a term is not defined by an applicable statute, then reference to a dictionary for its meaning is proper. *E.g. Hastings v. Grooters*, 144 Wn. App. 121, 127, 182 P.3d 447 (2008) ("When interpreting a term that is not defined in the statute, courts may refer to a dictionary meaning and consider the subject matter and the context in which the words are used.").

WEBSTER ONLINE, www.m-w.com. Thus, the term "public interest" means something relating to the people in which there is an advantage to them or responsibility by them.

Washington courts agree that the public interest must either solve an existing problem or provide some kind of benefit to the public. In *State v. Bank of California*, 5 Wn. App. 861, 491 P.2d 697 (1971), the Court of Appeals was asked to decide whether a greenbelt area for which the State had initiated condemnation proceedings was actually a public use. The court concluded that it was not as there was no evidence that the greenbelt was for the benefit of passing motorists, there was no evidence that it was to be used as a noise buffer, or a sun shield or wind break all acknowledged public uses. Rather, the court concluded that there was substantial evidence that the greenbelt was for the benefit of 4 to 5 property owners by screening them from a highway and a power line. *Id.* at 866-867.

Additionally, a public project must solve a problem. In *State v. Culley*, 11 Wn. App. 695, 524 P.2d 437 (1974), a challenge was made to public use and necessity against an

action by the Yakima Valley College which sought to acquire additional lands. There, the evidence presented revealed:

> On the question of whether the public interests require the use, it is clear that the present 24-acre site of the community college is inadequate for its enrollment, according to comparative studies of other systems. Even after this acquisition, the campus will have less acreage than the college should have based upon its enrollment. Further, space shortages in the existing facilities require the use of off-campus facilities. If the community college system is to provide effective education, it is in the public interest to provide adequate facilities.

*Id.* at 701. There is no similar evidence here of what the City's private partners in the Mercer Street project are to receive.

First, as stated above, the private participation in the Mercer Project is unknown—thus the question of whether or not the Mercer Project exists for the benefit of a private party cannot be answered. Given this, *Bank of California*, and *Culley*, until the private participation in the Mercer Project is determined, and subject to a constitutional scrutiny it is impossible to determine if the public interest is served by it.

Second, the City's own documents prove that the Project will not solve the problem presently posed—traffic congestion will not be eased. While *Culley* is famously cited for the proposition that land may be acquired for future projects, it also

requires that the land acquired must solve an identified problem. Here, there is no dispute that the proposed project simply does not fix the problem, a fact that was publically acknowledged by Jan Drago, City Council Member and Chair of the City's Transportation Committee. CP 385. Councilmember Drago stated:

> Q: (Interviewer): So, you know, on balance you don't really help traffic congestion. Is it worth $200 million to not help traffic congestion?
>
> A: (Jan Drago): I'll concede that. The purpose is much greater.

CP 385. For what other purpose then is the Mercer Project than for a roadway project to alleviate traffic congestion as mandated by the Neighborhood Plan? That information too is not disclosed by the City. Even the Seattle Times reported that according to the City's studies the Mercer Project "won't assure faster traffic flow." CP 198. Thus, it is undisputed that the Mercer Project has some other undisclosed purpose which, in the words of Mayor Nickels himself (*infra)* is for the benefit of the surrounding property owners. Again, the specter of the privileges and immunities clause rises.

Third, while this is ostensibly a transportation project as a part of the larger Neighborhood Plan, the public interest has not

been established as there is a complete failure of proof by the City that the public would benefit from the Mercer Project or that the requirements of the Comprehensive Plan have been met. Rather, the Traffic Study concludes that traffic congestion would not be alleviated but would remain the same under general conditions, but morning peak travel hours would be worse. CP 163.

Fourth, as in *Bank of California*, the evidence in this case proves that the Mercer Project if only for the benefit of surrounding property owners as acknowledged by Mayor Nickels in an interview on the City of Seattle's television program "*Ask the Mayor*," broadcast on the Seattle Channel on May 14, 2008:

| | |
|---|---|
| Question: | How much will you ask of South Lake Union Property Owners, for instance? |
| Mayor Nickels: | We've I think within the $192 million budget, I think we've targeted **about $36 million coming from the property owners who will benefit directly by it. And, as fair amount from outside sources**, as well. Not all the rest is coming from the city Bridging the Gap money. |

(Emphasis added.) CP 383.

If the Mercer Project is for the benefit of surrounding property owners, then they must be identified (if they are in fact the private participators) as must be the benefit they are to receive and the contribution they make. Again, without this information, the constitutionally mandated balancing test cannot be employed.

## D. THE RECORD IS NOT SUFFICIENTLY DEVELOPED TO DETERMINE NECESSITY

*Convention Center* also set forth the standard for determining whether or not the condemned property is necessary for the public use.

> ... a determination of necessity by a legislative body is conclusive in the absence of proof of actual fraud or such arbitrary and capricious conduct as would constitute constructive fraud. ... Fraud or constructive fraud would occur if the public use was merely a pretext to effectuate a private use on the condemned lands.

*Convention Center*, 136 Wn.2d at 823. However, this standard is not a rubber stamp of a legislative body's (here the Seattle City Council) actions.

> [The Washington] "constitution arose from a profound distrust of the Legislature and in large part was designed to strictly limit the Legislature. [Lebbeus J. Knapp, *Origin of the Constitution of the State of Washington,* WASH. HIST. Q. 227, 228 (1913)] at 250 ("[O]f all oppressive and unjust instruments of government the legislature is the

> greatest and most irresponsible."). The founders understood circumstances and political climates may change but principles and human nature do not.

(Footnote omitted.) *State v. Rivers*, 129 Wn.2d 697, 720, 921 P.2d 495, 506 (1996) (Chambers, J., dissenting). In analyzing the necessity of a public project, this court set out the following non-exclusive list of factors, such as:

> the dollar contribution of the private party, the percentage of public versus private use and whether the private use is occurring in an architectural surplus of usable space.

*Convention Center*, 136 Wn.2d at 823. That list of factors continues to grow as acknowledged by this Court in *HTK Management* wherein it stated that courts also "consider costs of the project as a relevant factor." 155 Wn.2d at 635-36. Further, all property involved in a project is considered, not just the property at issue. *Lynnwood*, 118 Wn. App. at 681.

As is shown in the record, the City's refusal to identify the private funding source and the specifics of the agreement with that private funding source is fraud, either actual or constructive.[9]

---

[9] West Marine cannot locate a case in Washington where the elements of fraud and/or constructive fraud are specifically analyzed in any case involving eminent domain.

### 1. The City is Guilty of Actual Fraud as it has a Duty to Disclose the Particulars of the Private Funding

The City's failure to disclose particulars of the private participation constitutes an actual fraud. There are two ways to establish fraud. A party may either affirmatively plead and prove the nine elements of fraud[10] or may simply show that another party breached an affirmative duty to disclose a material fact. *Crisman v. Crisman*, 85 Wn. App. 15, 21, 931 P.2d 163 (1997). Here, the law imposes a duty on the City as a part of its burden of proof. Further, disclosure of particulars of the private participation is required as a constitutional matter as the mandated balancing test between the private participation and the public participation cannot be conducted without the disclosure of such information. *See generally Convention Center*, *Westlake II*, *Westlake I* and *Lynnwood*. The City, which holds all the information regarding the Mercer Project, necessarily has superior knowledge of the project which status imposes an affirmative duty to disclose the information. *Huling*

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[10] The elements of fraud are: "(1) representation of an existing fact; (2) materiality of the representation; (3) falsity of the representation; (4) knowledge of the falsity or reckless disregard as to its truth; (5) intent to induce reliance on the representation; (6) ignorance of the falsity; (7) reliance on the truth of the representation; (8) justifiable reliance; and (9) damages." *In re: Estate of Lint*, 135 Wn.2d 518, 533 n.4, 957 P.2d 755 (1998).

*v. Vaux*, 18 Wn. App. 222, 566 P.2d 1271 (1977); *see also Alexander Myers & Co. v. Hopke*, 88 Wn.2d 449, 565 P.2d 80 (1977); *see also Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960); *Sorrell v. Young*, 6 Wn. App. 220, 491 P.2d 1312 (1971). The "suppression of a material fact which a party is bound in good faith to disclose is equivalent to a false representation." *Oates v. Taylor*, 31 Wash. 898, 199 P.2d 924 (1948). The City's steadfast refusal to disclose the particulars of the private participation is simply a fraud and a complete failure to meet its burden of proof.

**2. The City is Committing a Constructive Fraud**

If not actual fraud based on a duty to disclose, then the City's failure to provide the details of the private participation constitutes a constructive fraud.

> Conduct that is not actually fraudulent but has all the actual consequences and legal effects of actual fraud is constructive fraud. *Dexter Horton Bldg. Co. v. King County,* 10 Wn.2d 186, 191, 116 P.2d 507 (1941). Breach of a legal or equitable duty, *irrespective of moral guilt,* is "fraudulent because of its tendency to deceive others or violate confidence." BLACK'S LAW DICTIONARY 314 (6th ed.1990). This court has defined constructive fraud as failure to perform an obligation, not by an honest mistake, but by some "interested or sinister motive." *In re Estate of Marks,* 91 Wn. App. 325, 336, 957 P.2d 235,

*review denied,* 136 Wn.2d 1031, 972 P.2d 466 (1998).

*Green v. McAllister*, 103 Wn. App. 452, 467-68, 14 P.3d 795 (2000).

> Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or in nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follows from actual fraud, and for which it gives the same or similar relief as that granted in cases of real fraud.

*Dexter Horton Bldg. Co. v. King County,* 10 Wn.2d 186, 191, 116 P.2d 507 (1941).

> Furthermore, fraud is a factual matter which may be inferred from circumstances. *State v. Bryant*, 73 Wn.2d 168, 437 P.2d 398 (1968); *State v. Konop*, 62 Wn.2d 715, 384 P.2d 385 (1963). *See also King County v. Theilman*, 59 Wn.2d 586, 369 P.2d 503 (1962).

*State v. Gallagher*, 15 Wn. App. 267, 278, 549 P.2d 499, 506 (1976). There are at least two cases in which Washington courts have concluded that a constructive fraud, at least, was present in an eminent domain matter.

The first (and again) is *King County v. Theilman*, 59 Wn.2d 586, 369 P.2d 503 (1962). There, this Court was asked to decide whether King County's use of the power of eminent domain for a road was proper. King County sought to condemn

the Theilman's property for a public road which was intended to provide access to property owned by the Highland Development Company. In concluding that the project failed under a necessity analysis, the Court stated:

> From the record, it is apparent that the Highland Development Company could not have condemned relator's property as a private way of necessity; the company had highway frontage and two feasible ways of approach. Though we do not think the county's participation in taking relator's property by eminent domain is a cloak to cover private objectives, the effect of this action is to allow a private party to do indirectly that which the law forbids him to do directly. The ultimate effect is to allow a neighboring land developer to take private property for a private use. This action is the county's in name only. **It had no funds budgeted either to acquire relator's land or to build the road across it.**

(Emphasis added.) *Id.* at 595-96. This Court concluded that the project was improper and reversed the finding of public use and necessity.

The second matter is *Cowlitz County v. Martin*, 142 Wn. App. 860, 177 P.2d 102, *review denied*, 164 Wn. 2d 1021 (2008). There, Cowlitz County sought to condemn a portion of the Martin's property for the installation of a culvert to be used solely for fish passage. The case involved the Salmon Recovery Act, RCW 77.85.010 *et seq.* which specifically prohibited compulsory compliance with the act by any property

owner. Cowlitz County contended that the project was also a county road project and thus a proper use of the power of eminent domain under RCW Chapter 8.08. The Court stated:

> A reading of the entire resolution shows that the project had no road improvement purpose independent of the culvert replacement under the Salmon Recovery Act; once the new culvert was installed, the road bed of Coyote Lane would have to be replaced. The County Commissioners chose to proceed under the Salmon Recovery Act and authorized condemnation for no other public purpose. In this situation they may not proceed at trial under RCW 8.08.020.

*Cowlitz County*, 142 Wn. App. at 867. Obviously, these circumstances constitute a constructive fraud even if not so stated by Division Two.

What both *Theilman* and *Cowlitz County* illuminate is that arguing that a project includes a roadway element will not correct other deficiencies in the case or constitute a basis to rubber stamp the question of public use and necessity. In *Theilman*, a roadway case, this Court noted that King County sought to achieve a result for a private property owner that the private property owner could not achieve on its own. In *Cowlitz County*, Division Two noted that simply inserting a roadway

project into an otherwise improper project did not get the project past a public use and necessity analysis.

### E. THE CITY'S AUTHORIZING ORDINANCE IS DEFECTIVE BECAUSE IT DOES NOT IDENTIFY PRIVATE PARTICIPATION FOR THE PROJECT.

The court below also erred by entering a finding of public use and necessity because the City's ordinance authorizing condemnation is defective under RCW 8.12.040, which states:

> When the corporate authorities of any such city shall desire to condemn land or other property, or damage the same, for any purpose authorized by this chapter, such city shall provide therefor by ordinance, and unless such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, compensation therefor shall be made from any general funds of such city applicable thereto. If such ordinance shall provide that such improvement shall be paid for wholly or in part by special assessment upon property benefited, the proceedings for the making of such special assessment shall be as hereinafter prescribed, in this chapter....

This language requires that the City specifically identify whether private funds will be sought for an improvement project, and identify those funds. If the City does not do so, all funds for the improvements sought by the City must be made from the city's general funds.

Under RCW 8.12.040, the 2007 Ordinance is defective for at least two reasons. First, it does not specify the method of payment for the improvements sought by the City, it only addresses method of payment for the acquisition for the condemned property:

> The cost of the acquisitions including purchase price and transaction costs, together with relocation benefits to the extent required by law, shall be paid from the funds appropriated, or to be appropriated, for such purposes in connection with the project.

CP 31-32. The 2007 Ordinance is therefore defective because it is completely silent on the source of funds for the Mercer Corridor Project and the improvements sought by the project, which is "reconstructing the existing Mercer Street/Valley Street couplet."[11]

The 2007 Ordinance also fails to identify the private sources of funds. RCW 8.12.040 states that unless the source of payment is identified, project funds must come from the City's general fund *only*. The 2008 Ordinance similarly fails this

[11] The condemnation of land and the improvement sought by a project are not one in the same under the statute. In certain cases, a property acquisition in itself can constitute the "improvement" for the purposes of RCW 8.12.040. For example, in *City of Tacoma v. Welcker*, 65 Wn.2d 677, 399 P.2d 330 (1965), the city sought to acquire land as a buffer area for the city's watershed area. *Id.* at 680. In this case, however, the improvement is not the property acquisition, it is the construction related to the entire Mercer Corridor Project. CP 30-32.

standard. In fact at the public use and necessity hearing, the City admitted that the City was in negotiations for the public participation and City officials have also confirmed that private resources are actively being sought for the project. CP 15; CP 383.

### F. WEST MARINE IS ENTITLED TO ITS ATTORNEY FEES AS THE CITY HAS FAILED TO MEET ITS BURDEN OF PROOF

Further, should the court reverse the trial court and find that the City cannot acquire the property by the exercise of condemnation (as argued above), then West Marine is entitled to an award of its attorneys fees and costs. RCW 8.25.075.

## VI. CONCLUSION

> It is the duty of courts to uphold the rights of private property owners [and possessors] against the inroads of public bodies who seek to acquire it for private purposes which they honestly believe to be essential for the public good.

*Hogue v. Port of Seattle,* 54 Wn.2d 799, 838, 341 P.2d 171 (1959).

The City has not performed the necessary groundwork prior to initiating these condemnation proceedings. The trial court should be reversed and this matter dismissed until the City finalizes and discloses all private participation in the Project at

which point it can reinitiate its action and a constitutional analysis on that private participation can be conducted.

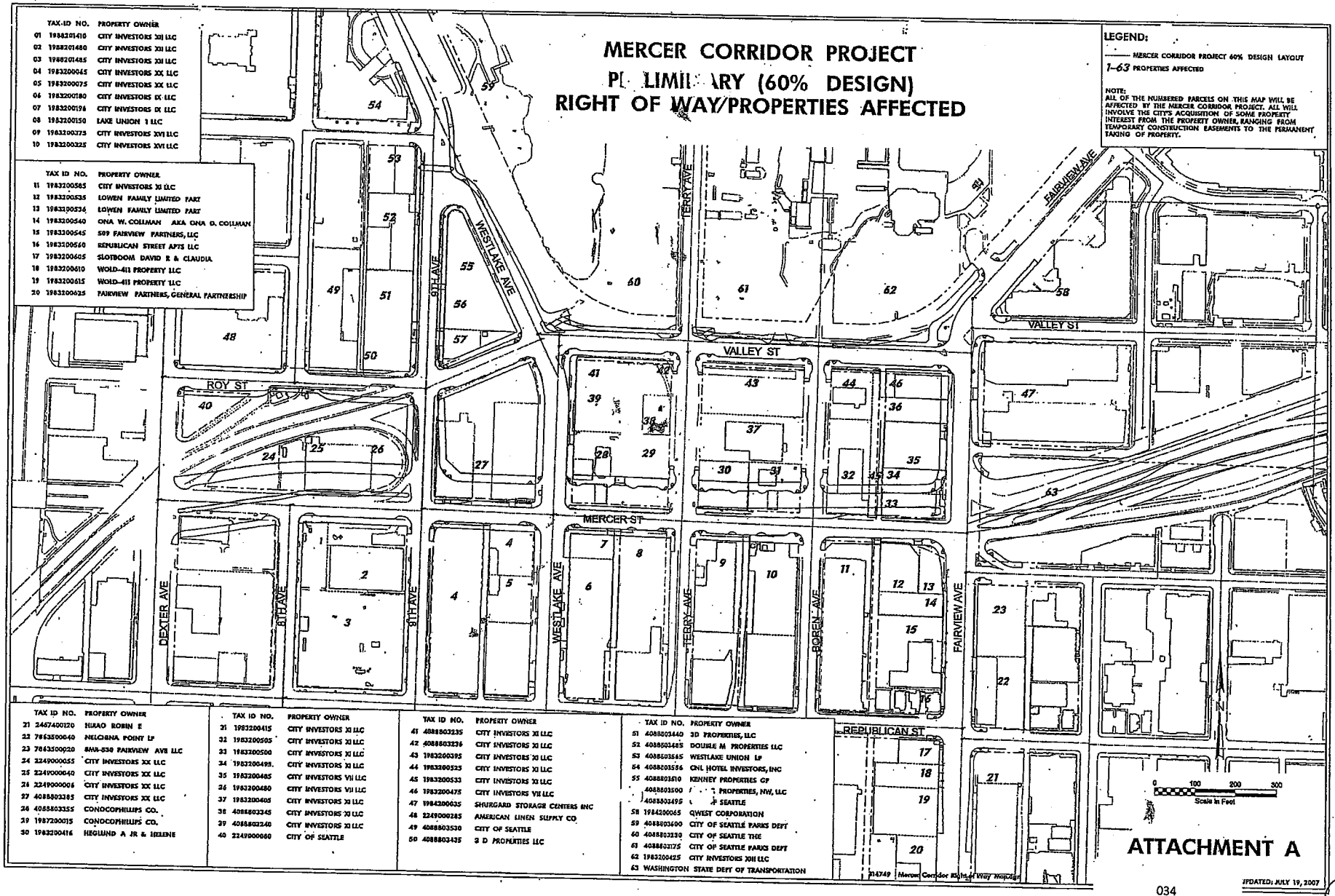
Respectfully submitted this 7th day of January, 2009.

THE LAW OFFICE OF CATHERINE C. CLARK, PLLC

By: _____
Catherine C. Clark, WSBA 21231
John P. Bagley, WSBA 31552
Attorneys for Respondent

# Appendix A

# MERCER CORRIDOR PROJECT
# PRELIMINARY (60% DESIGN)
# RIGHT OF WAY/PROPERTIES AFFECTED




| | TAX-ID NO. | PROPERTY OWNER |
|---|---|---|
| 01 | 1968201410 | CITY INVESTORS XII LLC |
| 02 | 1968201480 | CITY INVESTORS XII LLC |
| 03 | 1968201485 | CITY INVESTORS XII LLC |
| 04 | 1983200045 | CITY INVESTORS XX LLC |
| 05 | 1983200075 | CITY INVESTORS XX LLC |
| 06 | 1983200180 | CITY INVESTORS IX LLC |
| 07 | 1983200196 | CITY INVESTORS IX LLC |
| 08 | 1983200150 | LAKE UNION 1 LLC |
| 09 | 1983200275 | CITY INVESTORS XVI LLC |
| 10 | 1983200225 | CITY INVESTORS XVI LLC |

| | TAX ID NO. | PROPERTY OWNER |
|---|---|---|
| 11 | 1983200585 | CITY INVESTORS XI LLC |
| 12 | 1983200535 | LOWEN FAMILY LIMITED PART |
| 13 | 1983200536 | LOWEN FAMILY LIMITED PART |
| 14 | 1983200540 | ONA W. COLLMAN AKA ONA O. COLLMAN |
| 15 | 1983200545 | 509 FAIRVIEW PARTNERS, LLC |
| 16 | 1983200560 | REPUBLICAN STREET APTS LLC |
| 17 | 1983200605 | SLOTBOOM DAVID R & CLAUDIA |
| 18 | 1983200610 | WOLD-411 PROPERTY LLC |
| 19 | 1983200615 | WOLD-411 PROPERTY LLC |
| 20 | 1983200625 | FAIRVIEW PARTNERS, GENERAL PARTNERSHIP |

| | TAX ID NO. | PROPERTY OWNER |
|---|---|---|
| 21 | 2467400120 | HUAO ROBIN E |
| 22 | 7863500040 | NELGENA POINT LP |
| 23 | 7863500020 | SMR-530 FAIRVIEW AVE LLC |
| 24 | 2249000055 | CITY INVESTORS XX LLC |
| 25 | 2249000040 | CITY INVESTORS XX LLC |
| 26 | 2249000006 | CITY INVESTORS XX LLC |
| 27 | 4088803385 | CITY INVESTORS XX LLC |
| 28 | 4088803355 | CONOCOPHILLIPS CO. |
| 29 | 1987200015 | CONOCOPHILLIPS CO. |
| 30 | 1983200416 | HEGLUND A JR & HELENE |

| | TAX ID NO. | PROPERTY OWNER |
|---|---|---|
| 31 | 1983200415 | CITY INVESTORS XI LLC |
| 32 | 1983200505 | CITY INVESTORS XI LLC |
| 33 | 1983200500 | CITY INVESTORS XI LLC |
| 34 | 1983200495 | CITY INVESTORS XI LLC |
| 35 | 1983200485 | CITY INVESTORS VII LLC |
| 36 | 1983200480 | CITY INVESTORS VII LLC |
| 37 | 1983200405 | CITY INVESTORS XI LLC |
| 38 | 4088803345 | CITY INVESTORS XI LLC |
| 39 | 4088803340 | CITY INVESTORS XI LLC |
| 40 | 2249000080 | CITY OF SEATTLE |

| | TAX ID NO. | PROPERTY OWNER |
|---|---|---|
| 41 | 4088803335 | CITY INVESTORS XI LLC |
| 42 | 4088803336 | CITY INVESTORS XI LLC |
| 43 | 1983200395 | CITY INVESTORS XI LLC |
| 44 | 1983200525 | CITY INVESTORS XI LLC |
| 45 | 1983200533 | CITY INVESTORS XI LLC |
| 46 | 1983200475 | CITY INVESTORS VII LLC |
| 47 | 1984200635 | SHURGARD STORAGE CENTERS INC |
| 48 | 2249000285 | AMERICAN LINEN SUPPLY CO |
| 49 | 4088803530 | CITY OF SEATTLE |
| 50 | 4088803435 | S D PROPERTIES LLC |

| | TAX ID NO. | PROPERTY OWNER |
|---|---|---|
| 51 | 4088803440 | 3D PROPERTIES, LLC |
| 52 | 4088803485 | DOUBLE M PROPERTIES LLC |
| 53 | 4088803565 | WESTLAKE UNION LP |
| 54 | 4088803586 | CNL HOTEL INVESTORS, INC |
| 55 | 4088803610 | KENNEY PROPERTIES GP |
| | 4088803500 | [illegible] PROPERTIES, NW, LLC |
| | 4088803495 | [illegible] F SEATTLE |
| 58 | 1984200065 | QWEST CORPORATION |
| 59 | 4088803600 | CITY OF SEATTLE PARKS DEPT |
| 60 | 4088803230 | CITY OF SEATTLE THE |
| 61 | 4088803175 | CITY OF SEATTLE PARKS DEPT |
| 62 | 1983200425 | CITY INVESTORS XIII LLC |
| 63 | WASHINGTON | STATE DEPT OF TRANSPORTATION |

LEGEND:

——— MERCER CORRIDOR PROJECT 60% DESIGN LAYOUT

*1–63* PROPERTIES AFFECTED

NOTE:
ALL OF THE NUMBERED PARCELS ON THIS MAP WILL BE AFFECTED BY THE MERCER CORRIDOR PROJECT. ALL WILL INVOLVE THE CITY'S ACQUISITION OF SOME PROPERTY INTEREST FROM THE PROPERTY OWNER, RANGING FROM TEMPORARY CONSTRUCTION EASEMENTS TO THE PERMANENT TAKING OF PROPERTY.

**ATTACHMENT A**

214749 Mercer Corridor ROW_Prop_Affected

UPDATED: JULY 19, 2007

**Certificate of Service**

I hereby certify that I caused the foregoing document to be served upon the below named individual in the identified manner on this 7th day of January, 2009:

**Via Hand Delivery**

William McGillin
City of Seattle
Senior Assistant City Attorney
600 4th Avenue, 4th Floor
Seattle, WA 98124
Counsel for the City of Seattle

Margaret Pahl
King County Prosecuting Attorney
W400 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Counsel for King County

John P. Braislin
Betts Patterson & Mines
701 Pike Street, Suite 1400
Seattle, WA 98101
Counsel for Heglund

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Catherine C. Clark

IN THE SUPERE COURT OF THE STATE OF WASHINGTON
THE CITY OF SEATTLE

Plaintiff/Petitioner

vs

No. 82192-5

ALBERT HEGLUND JR, ET UX., ET AL.

DECLARATION OF EMAILED DOCUMENT (DCLR)

Defendant/Respondent

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I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 119 W. Legion Way, Olympia, WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 53 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: 1/7/09 at Olympia, Washington.

Signature Ingrid Elsinga

Print Name: Ingrid Y. Elsinga